



**Muriu v Family Bank Limited (Cause 326 of 2018)
[2023] KEELRC 3286 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 326 OF 2018
K OCHARO, J
NOVEMBER 23, 2023**

BETWEEN

MARY WAMAITHA MURIU CLAIMANT

AND

FAMILY BANK LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 15th March 2018 charging that the Respondent wrongfully and unlawfully terminated her employment and thus sought the following reliefs:
 - i. 12 months’ salaries for the wrongful dismissal.....Ksh. 779,700.
 - ii. Unpaid leave days.....Ksh. 129, 950.
 - iii. Unpaid house allowance.....Ksh. 606, 443.
 - iv. Salary in lieu of notice.....Ksh. 64, 975.
2. Upon being served with the summons to enter appearance, the Respondent did enter the appearance on the 11th of June 2018 and filed a Response to the Memorandum of Claim of the same date.
3. At the close of pleadings, the matter became destined for hearing inter partes on merit. Subsequently, the Claimant’s case was heard on the 29th of September 2022, while the Respondent’s was on the 2nd of February 2023.
4. At the full hearing of the parties’ respective cases this Court directed the filing of written submissions within specific timelines. The parties adhered to the directions, therefore, this judgment is with the benefit of the submissions.



The Claimant's Case

5. The Claimant stated that she came into the employment of the Respondent on the 15th of November 2012, as a Relationship Officer vide a letter of appointment dated the 15th of November 2012 at a monthly salary of Ksh. 51, 360 which was later increased to Ksh. 64, 975 vide a salary review letter dated the 24th of June 2014. She performed her duties diligently and honestly with dedication and per the terms of the employment contract and the Respondent's code of ethics,
6. It was the Claimant's Case that the Respondent wrongfully and unlawfully terminated her services without notice. Further, she was not given the reasons for the termination. The termination was illegal, unfair and un-procedural thus entitling her to the reliefs sought in her memorandum of claim.
7. Cross-examined, she testified that she was never issued with any suspension letter or the suspension letter exhibited by the Respondent. Further, she was charged in a criminal matter but acquitted under section 210 on the 20th of September 2022. A typed copy of the judgment thereof is yet to be supplied to her.
8. It was her testimony that she did not receive the Respondent's invitation letter of 8th April 2015. Additionally, she did not receive the dismissal letter presented to the court by the Respondent. She only saw it for the first time when it was filed in court. The fact that there was no salary coming through made her realize that she might have been discharged from her employment.
9. The Claimant further testified that she called her Manager severally seeking clarification on the position of her employment. The Manager eventually got impatient with her and directed her to wait for his call, to date she has not received any call from him.
10. In her evidence under re-examination, she stated that the suspension letter produced by the Respondent appears to have been issued on the 21st of March 2015, a time, when she was still in police custody. She remained in custody up to 25th March 2015. She never received the letter and, in the circumstances, she would not have.
11. Commenting on the alleged disciplinary process by the Respondent, the Claimant urged this Court to conclude that she was never taken through any disciplinary hearing as alleged. Contrary to the picture given by the Respondent's minutes dated 20th May 2020, the dismissal letter indicates that the disciplinary hearing was conducted on the 6th of May 2020.

The Respondent's Case.

12. The Respondent's case was presented by Stephen Kimani Ngare, its Human Resource Business Partner. The witness stated that the Claimant was first employed under a one [1] year contract with effect from the 15th of November, 2010 in the position of Sales and Business Development Officer, Nairobi region at a monthly salary of Ksh. 40,000. Later she was offered a permanent position on the 15th of November, as a Relationship Officer- Small Medium Enterprises, based at the KTDA Corporate Branch Nairobi, with a salary of Ksh. 51, 360. The contract was renewable annually subject to agreed performance standards.
13. On the 12th May 2014, her position/role was subsequently changed from the Relationship Officer to Credit Analyst and her remuneration was reviewed to Ksh. 64, 975.
14. It was contended that the Claimant was suspended from employment vide a letter dated 21st March 2015 for one month to pave the way for investigations into a report made by a bank Customer, Joel



- Kariuki Mwaniki that she had defrauded him of the sum of Ksh. 4,500,000. The Respondent was forced to refund the money into the Customer's account.
15. It was further asserted that pursuant to the allegations and attendant investigations together with a complaint by the customer to the police, the Claimant was arraigned and charged in Court with the offence of stealing contrary to section 268 [1] as read with section 275 of the Penal Code in Criminal Case number 535 of 2015, Republic vs Mary Wamaitha Muriu and Jackson Migwi Kirika.
 16. It was the Respondent's case that the Claimant was issued with a show cause letter on the 8th of April 2015, requiring her to attend a Disciplinary Committee hearing on the 15th of April 2015 regarding her conduct as a banker. The letter specifically stated the accusations against her, defrauding a customer of the sum of Kshs. 4,500,000. Further, that the outcome of the disciplinary hearing could have far-reaching consequences on her contract of employment, and that the hearing could proceed even if she failed to attend.
 17. The witness stated that despite the invitation, the Claimant failed to attend the Disciplinary Committee hearing which was held on the 6th May 2015. In the meeting it was observed; that the Bank's Customer had applied for and obtained a loan of Ksh. 7,000,000, which amount was credited to his account on the 27th of December 2014; the bank's customer was called by the Claimant on the 28th of December, 2014, through his mobile phone whereby she informed him that procedurally his account was not supposed to hold such a large sum of money and since the Central Bank of Kenya Auditors were at the branch the customer needed to reduce his account balance to an amount not more than Ksh. 2,500,000; she instructed the Customer to transfer Ksh. 3, 500,000 to account number 065-5699 in the name of Quan System. The Claimant transferred the amount as instructed.
 18. It was further contended that on the 6th March 2015, the Claimant called the Customer and instructed him to transfer a further Ksh. 1,000,000 to the same account. He did so. The Claimant promised to return the money to his account once the Central Bank of Kenya Audit was over. However, the money was not refunded at all, prompting him to report the matter to the Respondent. The Disciplinary Panel noted that the Claimant's action amounted to gross misconduct as she had used her position in the Respondent's bank to defraud its customer and exposed the bank to reputational risk.
 19. The witness stated that in the absence of any explanation by the Claimant and upon deliberations, the Panel recommended that the Claimant be summarily dismissed.
 20. It was the Respondent's position that the dismissal of the Claimant was lawful and was communicated through the letter dated 20th May 2015. The letter set out with specificity the reasons for the summary dismissal. Moreover, the said letter expressly stated that the Claimant would be paid her final dues upon the completion of the relevant clearance procedures with all the departments and handing over a duly completed clearance form to the Human Resources Department. The letter also stated that the Claimant's pension dues would be paid in accordance with the rules of the scheme which required her to fill out the relevant pension withdrawal form to facilitate payment.
 21. Lastly, the Respondent avers that the Claimant is not entitled to the reliefs sought in the Statement of the Claim and thus her claim should be dismissed with cost.
 22. Cross-examined by Counsel Mburu for the Claimant, he testified that according to the letter dated 8th of April 2015, the disciplinary hearing was to take place on the 15th of April 2015. However, there is no evidence produced by the Respondent to demonstrate that the disciplinary hearing was rescheduled from 15th May 2015 to 20th May 2015. The minutes of 20th May 2015 suggest that the hearing took place on the 20th May 2015.



23. It was his testimony that paragraph 2 of the letter dated 20th May 2015 indicated that the Claimant did not attend the disciplinary hearing on the stated date. She too failed to respond to the Notice to Show Cause.
24. The disciplinary proceedings embodied the panel's decision. The Human Resource Manager was tasked to process the separation process. In the ordinary run of things, the separation was to be effected after the decision.
25. It was his testimony that the dismissal letter does not refer to the disciplinary hearing. According to the letter, the dismissal was to take effect on the 6th May 2015. No hearing took place on this date.
26. The minutes of the disciplinary hearing were signed by the Director of ICT, the Head of Human Resources, the Company Secretary and the Senior Human Resource Officer.
27. In the contract dated 12th January 2010, the Claimant's postal address was given as 601 Nyeri. However, in the letter dated 20th May 2015, her address was indicated as 601-00100 Nairobi, an address different from the one on the contract of employment.
28. He further told the Court that he had no information about the outcome of the criminal case. Additionally, the internal processes are distinct from one another.

The Claimant's Submissions

29. The Claimant's counsel filed written submissions on the 15th of February 2023 distilling two issues for determination thus:
 - i. Whether the Claimant was unlawfully terminated from employment by the Respondent.
 - ii. Who should bear the cost of the suit?
30. The Claimant submitted that the contradictions evident in the Respondent's documents fail to give a coherent, believable and true account concerning the Claimant's dismissal. In his view, the documents were calibrated to mislead the court that there was a disciplinary hearing done, yet there was none. Parties should not be allowed to peddle lies as the Respondent has attempted to in this matter. Any party who attempts to mislead the Court should be punished. To buttress this point, reliance was placed on the case of *Ogutu vs Cabinet Secretary, Ministry of Lands & Physical Planning & 9 others; Natembeya & 2 others* [Third party] [Environment & Land Petition 7 of 2021] [2022] KEELC 2680 [KLR].
31. It was submitted that the open contradictions contained in the Respondent's documents speak to an apparent scheme to defeat justice and cannot be excused. Reliance was placed on the case of *MTG vs Republic* [Criminal Appeal E067 of 2021] [2022] KEHC 189 [KLR] cited by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs The Federal Republic of Nigeria* where the Court defined the word "contradiction" of evidence produced in court as follows:

"Now, contradiction means a lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of or contains a little more than what the other piece of evidence says or contains."



32. The Claimant further relied on the case of MEEK vs FLEMING [1961] QB 366 in fortification of her submission.
33. The Court was submitted to conclude that the Respondent did not conduct a disciplinary hearing as required under section 41 of the *Employment Act*. All the averments contained in the Respondent's claim were rebutted by the evidence of the Claimant. The onus was on the Respondent to demonstrate that it adhered to the statutory procedure contemplated under the provision. It didn't discharge the burden. To buttress these submissions, reliance was placed on the case of Galgalo Jarso Jillo vs Agricultural Finance Corporation [2021] eKLR where it was held:

“As mentioned earlier, the burden of proving the lawfulness of a termination lies with the employer. And this includes the employer demonstrating that he/she complied with the procedural dictates of section 41 of the *Employment Act* as read with sections 43 and 45 of the Act.”

34. The Claimant submitted that in essence, a fair procedure ensures that the right to be heard of an employee is protected and upheld. Reliance was placed on the case of Galgalo Jarso Jillo vs Agricultural Finance Corporation [2021] eKLR [Supra]. The Respondent did not discount her case that she was unfairly dismissed. Consequently, she should be awarded the damages as sought in the Statement of Claim.

The Respondent's Submissions

35. The Respondent submitted that the law relating to termination of contracts of service largely obtain in sections 41, 43, 44,45 and 47 of the *Employment Act*,2007. The provisions speak to procedural fairness, substantive justification, the burden of proof and who bears it.
36. It is now trite law that the *Employment Act* sets out two burdens of proof. The employee has the burden of proving the unlawfulness of the termination whilst the employer bears the burden of justifying the termination. To discharge his or her burden the employee needs to place before the Court prima facie evidence suggesting that a termination has occurred that lacks substantive justification and or procedural fairness. Once this happens the burden of proof shifts to the employer to justify the termination. To support these submissions reliance was placed on the case Josephine M. Ndungu & Others V Plan International Inc. [2019] eKLR.
37. It was submitted that in terms of the *Employment Act*, an employer will be deemed to have substantial justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. It is not a requirement of the law that the substantive ground must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that, it did not. The law is concerned with if the circumstances surrounding the decision to terminate would attract a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination. To support this position, support was sought in the judicial decision in Kenya Revenue Authority v Reuvel Waithaka Gitahi& 2 others [2019] eKLR.
38. The Claimant was suspended, investigated, and eventually dismissed on account of defrauding a customer. Furthermore, she was charged with the criminal offence of stealing contrary to section 268 as read together with 275 of the penal code. All these taken together would give a reasonable employer a ground to initiate disciplinary proceedings against her. The fact that the Claimant was subsequently acquitted of the criminal charges does not render the termination unfair.



39. Furthermore, the evidence adduced in court shows that the Respondent adhered to the dictates of procedural fairness. The Claimant was invited for a disciplinary hearing but she didn't attend. The discrepancy appearing on the termination letter concerning the date of dismissal is as a result of an inadvertent typing error regarding the disciplinary hearing date and the date of termination. The same doesn't not carry a substantive negative effect that diminishes the fairness in the procedure leading to the decision to terminate the Claimant's employment.
40. Lastly, the Respondent submitted that it had demonstrated sufficiently that there was substantive justification for the dismissal of the Claimant and that procedural fairness was present in the process leading to the termination of her contract of service.

Analysis And Determination.

41. From the pleadings, the evidence on the record, and the submissions by the counsel for the parties, the following issues present themselves for determination thus:
- i. Whether the termination of the Claimant's contract of service was both procedurally and substantively fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Who should bear the cost of the suit?

Whether The Termination Was Both Procedurally And Substantive Fair.

42. Before I delve any further into the issue, I find it imperative to comment on the burden of proof in a matter like this. For some time waters didn't seem settled over this legal issue in the Kenyan situation. As Counsel for the Respondent correctly submitted, section 47[5] of the *Employment Act*, provides for the burden of proof in disputes relating to termination of contracts of service. The provision places two different burdens on the employee on the one part and the employer on the other part. The employee bears the initial burden, while the employer bears a shifted one. Therefore, where the employee fails to discharge his or her burden, his or her case fails. Consequently, the employer won't have any burden to discharge. The employee is charged with the burden to establish prima facie that a termination occurred, and that the same was wrongful and or unfair. It is after the establishment that the burden shifts to the employer to prove that the termination was, not wrongful and or, unfair.
43. In Josphine M.Ndungu [supra], the Court stated and I agree;
- “Under Section 47[5] of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes prima facie that, the termination didn't fall within the four corners of the legal threshold set out by section 45 of the Act.”
44. Further, on the burden of proof, the Court of Appeal in the case of Muthaiga Country Club vs Kudheih Workers [2017] eKLR held:
- “The grievant having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the



alleged reasons for termination of the grievant's employment, and justify the grounds for the termination of the employment.”

45. I have carefully considered the material placed before this Court, inarguably, prima facie, the Claimant managed to demonstrate that her dismissal was not procedurally fair and upon valid and fair ground[s]. Further, the Respondent failed to discharge the shifted burden that followed. The details on the Claimant's success and the Respondent's failure shall come out shortly hereinafter.
46. Undoubtedly, when addressing the presence of fairness or otherwise in the termination of an employee's employment or summary dismissal of an employee, a court must consider two statutory aspects, substantive justification and procedural fairness. The two form the total unit of fairness. Any absence of any of them shall render the termination or summary dismissal unfair.
47. Section 41 of the *Employment Act* 2007 provides the structure for procedural fairness. It provides:
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
48. Inarguably, the procedure contemplated in section 41 of the Act is couched in mandatory terms, and it embodies three components. The employer contemplating termination on grounds of misconduct, poor performance, or physical incapacity, must notify the employee of the intention, and the reasons spurring the same. The employer then must give the employee adequate opportunity to prepare and make a representation on the grounds. When making the representation, the employee should be allowed to enjoy her or his statutory right of accompaniment, i.e. where he or she desires should be allowed to be accompanied by a colleague of his or her choice [where he or she is not a member of a trade union] or a trade union representative [where he or she is a member of a trade union]. Lastly, the employer must consider the representations made before deciding to terminate the employment of the employee.
49. The duty to establish that the procedure contemplated under section 41 of the Act was adhered to falls on the employer. Section 45 (2), clearly suggests so.
50. In a bid to establish that the process leading to the dismissal of the Claimant from employment was full of procedural fairness, the Respondent through its witness contended that the Claimant was informed, of its intention to take action against her, the grounds arousing the intention, and the implication of the initiated process on the employment relationship between her and the Respondent, allegedly through a letter dated 8th April 2015.
51. The letter dated 8th April 2015 tendered as evidence by the Respondent read in part:
- “Mary Wamaitha Muriu
Thru' Manager,



Family Bank Ltd,

KTDA Branch

Dear Mary,

Subject: Invitation to attend a disciplinary Hearing

This is to invite you to attend a disciplinary committee hearing, regarding your whereby as a banker you defrauded a customer Ksh. 4,500,000 details of which are known to you.

The meeting is scheduled to take place on Wednesday 15th April 2015, at 10.00 am at Family Bank Towers 10th Floor Meeting Room. During the hearing, you are entitled to come with a witness who should be a fellow staff of Family Bank Ltd.”

52. From the letter, it is well discernable that the disciplinary hearing was slated for the 15th of April 2015. Therefore, it could be commonplace, that to prove the fact that a disciplinary hearing took place, the Respondent was required to tender evidence that indeed the same happened on the stated date or if it took place on a different date, clear evidence that the Claimant was informed of the change of date, and the taking place. The documentary evidence placed before the Court shows that the disciplinary hearing process was conducted in the absence of the Claimant on the 20th of May 2015.
53. The Respondent’s witness did not testify that the date was changed from 15th April 2015 to 20th May 2015. He did not produce any communication that the Respondent directed to the Claimant of the date change. In my view, all that the witness did was to deliberately be unclear on this matter. This move, I must hold was not well thought. It exposed the Respondent as an uncandid party.
54. The Claimant denied having been served with the show cause letter. In this circumstance, it became imperative that the Respondent demonstrates that service was effected on the former and how. This Court has not lost sight of the fact that the letter on its body indicates that the same was to be delivered through her manager. There is no postal address on the letter, suggesting that a physical service was contemplated. The witness didn’t provide evidence to demonstrate how the service was done.
55. Furthermore, the summary dismissal letter dated the 20th May 2015 paragraph 2 reads in part;

“You have failed to respond to our show cause letter dated 8th April 2015 and also failed to attend a disciplinary hearing that was held on the 6th May 2015. This has put into question your credibility and integrity and the bank has therefore lost confidence in you. You are hereby dismissed summarily from the services of the Bank effective the 6th May 2015.”
56. This letter only aided to add confusion to the Respondent’s case as regards the service of notification on the Claimant, and the alleged hearing. The letter purports that the hearing was done on the 6th of May 2015, yet the disciplinary hearing minutes produced before this Court show the date of the hearing as 20th May 2015. In his evidence under cross-examination, the Respondent’s witness testified that no hearing took place on the 6th of May 2020. Counsel, for the Respondent, submitted that the contradiction concerning the date of the hearing flows from an inadvertent typing error on the letter. It should be known to Counsel that submissions have never been and shall not be a substitute for evidence. No evidence was led to demonstrate the error.
57. Considering the circumstances of this matter in their totality, this Court doesn’t find any difficulty in concluding that the documents presented by the Respondent and more specifically those that were geared towards demonstrating the presence of procedural fairness in the process leading to the decision



to dismiss the Claimant from employment, were deliberately made for purposes of this case, and meant to mislead the Court.

58. In the upshot, I find that the Claimant was not notified of the Respondent's intention and the ground[s] stirring the intention. Further, she was not invited to any disciplinary hearing, therefore she was not accorded an opportunity to make a representation on the ground[s]. Lastly, the decision was arrived at by the Respondent without considering any representations by her. The dismissal was procedurally unfair.
59. Section 43 of the Act requires an employer in a dispute like the instant one, to prove the reason[s] for the termination, otherwise the termination will be deemed unfair by dint of the provisions of section 45. It is imperative to state however that it is not enough for the employer to prove the reason[s] but must further demonstrate that the reason[s] was fair and valid as required by the provisions of section 45 (2) of the *Employment Act*.
60. The employer is burdened with the onus of satisfying the Court that there was a fair and valid reason for the termination of an employee's (Claimant's) employment. Indeed, this is what section 45 of the *Employment Act* requires of the employer. Time, and again, this Court has held that a burden of proof imposed on a party by a statute is only dischargeable by that party proffering sufficient evidence on the matters that he has to prove unless there is an admission or the court makes judicial notice thereof.
61. It was the Respondent's case that the Claimant was suspended to pave the way for investigations into her alleged involvement in defrauding its customer. Further, the alleged disciplinary process and dismissal were anchored on the investigations. The tone of the evidence of both the Respondent's witness and the Claimant was that the latter was not involved in the investigations. In my view, this coupled with the fact that the Claimant was adjudged not guilty in the criminal case, heightened the need on the part of the Respondent to place before this Court the investigation process details and outcome[s], to enable it to discern whether or not the reason for the dismissal was fair and valid.
62. The Respondent opted not to place forth the investigation report as evidence. The Court can only conclude that had the same been placed before it, it wouldn't have aided its case but prejudiced the same.
63. According to the Respondent the fact that the Claimant was charged with a criminal offence, was enough reason under section 44 of the Act for the Respondent to dismiss her. I am not persuaded by the argument. A reading of the entire provision doesn't reveal the position taken by the Respondent. If the position was to be taken as true, it would be so easy for malicious criminal charges to be instigated against an employee just to enable a summary dismissal. In so saying, this Court has not forgotten that there is a tort of malicious prosecution. The existence of the tort is indicative that sometimes criminal processes can be abused. Therefore, with great respect, it won't be reasonable for one to argue that a sanction of summary dismissal can simply be attracted because an employee has been charged with a criminal offence.
64. The evidence by the Respondent didn't help it discharge the burden under sections 43 and 45[2] of the Act.

Whether The Claimant Is Entitled To The Reliefs Sought.

i. 12 Months' Salary Compensation For The Unfair Termination

65. The Claimant sought compensation for the unfair dismissal amounting to Ksh. 779,700. This Court is cognizant of the fact that 12 months' gross wages or salary is the maximum awardable compensation



provided under section 49 [1] [c] of the [Employment Act](#) 2007. Granting of the relief is discretionary. Whether maximum compensation depends on the circumstances of the case.

66. I have considered the period the Claimant was engaged by the Respondent as a Relationship Officer and later a Credit Analyst, the fact that her dismissal was both procedurally and substantively unfair and the Respondent's conduct regarding the documents that were fronted in an attempt to show this Court that there was procedural fairness and come to a conclusion that she is entitled to the compensatory relief and to an extent of five [5] months' gross salary. Kshs. 324,875.

ii. Unpaid House Allowance.

67. The Claimant urged the Court to award her Kshs. 606,433 as unpaid house allowance for the 28 months, [the entire period] she was in the service of the Respondent. She contended that the latter didn't pay her the said allowance throughout her tenure. House allowance is a statutory right for employees and a legal obligation on the part of the employer to honour. Section 31 [1] of the [Employment Act](#) 2007, is couched in mandatory terms. It enjoins the employer to provide an employee sufficient housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary.
68. The Respondent however contended that the Claimant's salary was consolidated. The salary she was earning was inclusive of a house allowance. No doubt, section 31 [2] of the [Employment Act](#), 2007, envisages consolidation. Imperative to state however that where such consolidation is alleged, the basis for the allegation must be demonstrated. I have gone through the letter of appointment dated the 15th of November 2012 as well as the Salary Review letter dated the 25th of June 2014, they all speak to a consolidated salary.
69. The only letter of appointment that does not mention the consolidation aspect is the letter dated 12th November 2010 which provided that the Claimant was entitled to a salary of Ksh. 40,000 only. The letter was in respect of a one-year fixed-term contract. A house allowance is a monthly entitlement which accrues at the end of every month. Section 90 of the [Employment Act](#) 2007 provides that no civil action or proceedings based or arising out of the Act or a contract of service in general shall lie or be instituted unless commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage, within twelve months next after the cessation thereof. Applying the limitation imposed by the above-mentioned provision, I find that though the Claimant could have been entitled to unpaid house allowance for the one year, the same cannot be availed to her as the claim thereof is statute barred.

iii. One Month's Salary In Lieu Of Notice

70. The Claimant sought salary in lieu of notice of Ksh. 64,975. The Respondent resisted this claim arguing that having been summarily dismissed, she is not entitled to the relief. Having found that the dismissal was both procedurally and substantively unfair and cognizant of the fact that the employment was one terminable by a month's notice or payment in lieu thereof, I am convinced that the relief under this head should be availed to her pursuant to the provisions of section 35 of the [Employment Act](#) as read with section 36 thereof.
71. By reason of the foregoing, I hereby award the Claimant Ksh. 64, 975 salary in lieu of notice.

iv. Unpaid Leave Days.

72. The Claimant also urged this Court to award her compensation for earned but unutilized leave days. The [Employment Act](#) enjoined the Respondent to allow the Claimant to proceed for leave with pay



or compensation in lieu of untaken leave days. Annual leave is a statutory right that cannot be contracted or denied. The Respondent did not demonstrate either that the Claimant throughout her tenure, was allowed to enjoy this statutory right as and when it was due for enjoyment and or that whenever for one reason or the other she didn't utilize her leave days, she was compensated. Furthermore, section 74 of the Act enjoins the employer [Respondent] to keep all the records regarding the employee's employment, nothing could have been easier for the Respondent than to produce the record to disabuse the Claimant's claim.

73. Consequently, I hold that the Claimant is entitled to the relief claimed under this head, and hereby award her Ksh. 129, 950 for unutilized but not paid for leave days for the two years she was in the employment of the Respondent.

v. Service Pay.

74. Lastly, she urged the Court to award her service pay for the years worked as stipulated under section 35 [5] of the *Employment Act*, 2007. The Respondent vehemently resisted the Claimant's entitlement to the benefit contending that as she was summarily dismissed for gross misconduct, the same cannot be availed to her. Clause 6 of the letter of appointment Produced in evidence before this court, stipulated that the Claimant was to be a registered member of the NSSF and that the Respondent. Further Clause 8 of the said letter of appointment provided that the Claimant was eligible to join the Company's pension scheme. There is evidence on record that she was a member of the Family Bank Limited Staff Retirement Scheme under the UAP Life Assurance Limited.

75. Section 35(6) of the *Employment Act* excludes particular categories of employees from the benefit of service pay. They include those covered under NSSF and Pension schemes. The Claimant's contract of service placed her under the category of those excluded from claiming the benefit. The relief of service pay for the years worked cannot be availed to her, as the same shall lead to double benefiting.

Who Should Bear The Cost Of The Claim?

76. As costs follow the event and as there is no reason to compel a departure from this general principle, the Respondent shall bear the costs of this suit.

77. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

- a. A declaration that the dismissal of the Claimant from employment was both procedurally and substantively unfair.
- b. A month's salary in lieu of notice.....Ksh. 64,975.00.
- c. 5 [five] months' gross salary as compensation under the provisions of section 49[1][c] of the *Employment Act* Ksh. 324,875.00.
- d. Compensation for earned but unutilized leave days..... Ksh. 129,950.00.
- e. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
- f. Cost of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.



OCHARO KEBIRA

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

